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Nos. 2 and 3

In the Supreme Court of the United States

OCTOBER TERM [redacted] 1961

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, APPELLANT

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA, ET AL.

ORGANIZED VILLAGE OF KAKE, ET AL., APPELLANTS

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
Attorney,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, APPELLANT

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA, ET AL.

No. 327

ORGANIZED VILLAGE OF KAKE, ET AL., APPELLANTS

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The United States has not previously participated in these proceedings except that, at the request of Mr. Justice Brennan, it appeared at the oral hearing before him in support of the temporary restraining order sought by the Indian communities. This brief is filed to support the position of those communities that the restraint against action by the appellees should be made permanent.

ARGUMENT

I

THIS COURT HAS JURISDICTION OF THESE CASES

A. *The court below was a court of the State of Alaska at the time of the appeal:*—In *Parker* v. *McCarrey,* 268 F. 2d 907 (C.A. 9), the Ninth Circuit held that it had no jurisdiction of appeals from judgments rendered after January 3, 1959, the date of the President's proclamation of Alaska as a state, by the former United States District Court of the Territory of Alaska, even though the United States District Court for the District of Alaska was not organized or, at least, not functioning for lack of appointment of a judge.[1] This decision was followed in *Bridges* v. *Forbes,* 269 F. 2d 703 (C.A. 9), and *Jackson* v. *United States,* 270 F. 2d 384 (C.A. 9). We believe that these rulings of the Ninth Circuit are correct. See also *Kilpatrick* v. *McCarrey,* 360 U.S. 914.

Although the Ninth Circuit, in the *Parker* case, refused to express its opinion "on the current Alaska court situation," (p. 909) it is our position that, when Alaska was admitted as a state, the territorial institutions, including the territorial court, ceased to exist as such; that, by concurrent authority of the new State of Alaska (see Art. XV, Sec. 17, Constitution of the State of Alaska, Appendix A, *infra,* p. 33) and the United States (Section 18, Alaska Statehood Act, Appendix A, *infra,* p. 32), interim or transitional courts were

[1] A judge of the United States District Court was appointed on February 19, 1960, and other officials shortly thereafter.

created which, under established precedents, assumed the status of provisional state courts of the State of Alaska (*e.g., Benner* v. *Porter*, 9 How. 235, 241–242; *Ames* v. *Colorado Central R. Co.*, 1 Fed. Cas. 750). It is further the position of the United States that Congress could, and by Section 18 of the Alaska Statehood Act did, confer upon those state courts the power to try federal cases (see *Testa* v. *Katt*, 330 U.S. 386; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 361–362), and that the judgments of such courts are reviewable here if they are the judgments of the highest court of the State in which a decision could be had.

B. *The court below was the highest court of the State at the time of appeal:*—At the time the appeals were taken, the Supreme Court of Alaska had not been organized, no justices had been appointed, nor had any rules been made. That was the situation on July 11, 1959, when the temporary restraining order was issued by Mr. Justice Brennan. Since that time, that court has been organized, rules were adopted effective October 5, 1959, and the court is now functioning. But the situation at the time the appeal was taken was, so far as the Supreme Court of Alaska was concerned, similar to that which exists when a particular kind of case is not reviewable by the highest court of a state, as, for example, in *Thompson* v. *City of Louisville*, Oct. Term 1959, No. 59, decided March 21, 1960; *Smith* v. *California*, 361 U.S. 147. Certainly, in the words of 28 U.S.C. 1257, these appeals were taken to this Court from "the highest court of a

State in which a decision could be had." Whether access to a higher court is closed because of jurisdictional limitations or for lack of organization should not affect the availability of review by this Court. And the issue of jurisdiction should, we believe, be tested by reference to the time when the notices of appeal were filed—at the latest—since that is the action which definitively deprives the trial court of its jurisdiction.[2]

C. *The decision should be reviewed by appeal or certiorari*:—This would seem to be a proper case for appeal on the ground (28 U.S.C. 1257(1)) that the decision below was against validity of the federal statute in that the authority of the Secretary of the Interior to regulate fishing by Indians has been denied, or under 28 U.S.C. 1257(2) on the ground that state laws have been held valid as against claims under the federal law, especially the Statehood Act. In any event, the issues are clearly such that the causes should be reviewed by certiorari if appeal is considered to be inappropriate.

II

THE CASES ARE NOT MOOT

The situation presented as to fisheries in Alaska substantially changed on January 1, 1960, when general regulatory authority was transferred to the State

[2] *In re Federal Facilities Realty Trust*, 227 F. 2d 651, 653 (C.A. 7); *Borgmeier* v. *Stone*, 233 F. 2d 818 (C.A. 7); *Thompson* v. *Harry C. Erb, Inc.*, 240 F. 2d 452, 454 (C.A. 3); *Walker* v. *Felmont Oil Corporation*, 262 F. 2d 163, 165 (C.A. 6), certiorari denied, 361 U.S. 840; *United States* v. *Frank B. Killian Company*, 269 F. 2d 491, 494 (C.A. 6).

of Alaska under Section 6(e) of the Statehood Act (Appendix A, *infra*, pp. 25–26). Issues concerning the relative authority of state and federal officials during the prior transitional period—the primary issues at the hearing in July 1959 before Mr. Justice Brennan—have become moot by the passage of time. However, this results in narrowing the area of controversy but does not terminate it. The question still remains whether Alaska can now prohibit operation by these Indians of their fish traps, regardless of the extent of the power or authority of the Federal Government or the manner in which it chooses to exercise it. This controversy as to the State's power to proceed against appellants would seem to prevent mootness regardless of what federal action might be taken. In any event, on April 9, 1960, the Secretary of the Interior gave notice of proposed rule-making which would permit operation during the 1960 fishing season of traps at three sites by the Angoon Community, at four sites by the Village of Kake, and at four sites by the Metlakatla Community (see 25 Fed. Reg. 3079; Appendix to Brief for the Appellants in No. 327, pp. 34–38). There is every reason to believe, therefore, that the 1959 controversy will be repeated in 1960, and hence that these cases are not moot.[3] See, *e.g.*, *Taylor* v. *McElroy*, 360 U.S. 709; *McGrain* v. *Daugherty*, 273 U.S. 135, 180–182; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498.

[3] Although other fish trap sites are mentioned in the order, operation during 1960 is limited to the 11 listed and the present issue is, we assume, likewise so limited.

III

THE STATE OF ALASKA LACKS JURISDICTION TO REQUIRE THE ELIMINATION OF THE INDIAN FISH TRAPS

We agree with the basic position of appellants that officials of the State of Alaska are not authorized to prohibit operation of the appellants' 11 fish traps. We reach this result, however, by a somewhat different route than they do and we disagree with certain assumptions or assertions made in the course of some of their arguments.

A. *The Alaska Indian background.*—The issue hinges on the proper interpretation of Section 4 of the Alaska Statehood Act (*infra,* pp. 11–12). Preliminary to a discussion of that Act it is important to summarize certain historical facts and established legal principles basic to the controversy.

Fishing has always been a matter of predominant importance to the natives of Alaska, as this Court has more than once recognized. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86. However, the United States has not, by treaty or agreement, established permanent homes—*i.e.,* created "recognized Indian title"—for any of the Alaskan natives. In two instances—those involved in *Alaska Pacific* and *Hynes, supra*—reservations, including adjoining fishing waters, have been set aside for the temporary use of the appellants in No. 326 (the Metlakatla) and the Native Village of Karluk. In *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, this Court held that an alleged taking of "unrecognized" Indian title from

Alaskan natives was not compensable under the Fifth Amendment "because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States * * *" (348 U.S. at 285). This decision further rejected the claim (which had been sustained by the Court of Appeals for the Ninth Circuit in *Miller* v. *United States*, 159 F. 2d 997) that statutes of 1884 and 1900—providing (in general) that natives in Alaska should not be disturbed in their possession of land actually occupied by them—were a recognition of a right of permanent occupancy. The Court repeated the distinction, strongly emphasized in the *Hynes* case,[4] between permissive occupation and a grant of legal rights and held that in the federal statutes "what was intended was merely to retain the *status quo* until further congressional or judicial action was taken" (348 U.S. at 278). The Court went on to say that "[t]his policy of Congress toward the Alaska Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 * * *" which authorized the action alleged in the *Tee-Hit-Ton* case to constitute a taking. Subsequently, the Court of Claims dismissed a petition of the Tee-Hit-Tons seeking recovery for

[4] In *Hynes* (337 U.S. at 103), the opinion described the situation as follows:

> An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim."

the alleged taking of an exclusive right of fishing. *Tee-Hit-Ton Indians* v. *United States,* 132 C. Cls. 624. After referring to the materials on which the Indians relied to establish a private exclusive right of fishing, the Court of Claims said (pp. 625–626):

> According to the present law, such a right could not be acquired, even by a purported grant from the Executive. The Act of June 6, 1924, 43 Stat. 464, "For the Protection of the Fisheries of Alaska," provides in Section 1 that "no exclusive or several right of fishery shall be granted" in Alaskan waters.

And after citing *Shively* v. *Bowlby,* 152 U.S. 1, and *Sutter* v. *Heckman,* 1 Alaska 81, the court concluded (pp. 626–627):

> If we, as the plaintiff's quoted authority says we must do, indulge every presumption against the supposition that at some time in the remote past a grant was made, though the evidence of it has been lost, this is no case for prescription, since those familiar with the history of the times say it was contrary to the policy of the Government to make such grants.

A year earlier, the Court of Claims had dismissed a petition seeking recovery for the alleged taking of the right of an Alaskan group to take seals. *Aleut Community of St. Paul Island* v. *United States,* 127 C. Cls. 328. The court held (pp. 334–335):

> Whatever rights the Aleuts had to take seals in the waters off St. Paul Island under Russian dominion, there can be no doubt that upon acquisition of that territory by the United States

> their right to do so was subject to the paramount power of the United States to regulate and control it.

It then concluded, referring to the various Acts of Congress relating to seal fishing (pp. 335–336):

> Under these Acts, the only right plaintiff had to kill seals was the right to kill them for food and clothing and for use in the manufacture of small boats, and for the benefit of the United States. The Government had the right to prohibit altogether plaintiff from engaging in sealing and, hence, had the right to permit it to do so only on the conditions imposed. When plaintiff killed seals it killed them for the benefit of the United States and with knowledge that the United States would sell the skins and put the proceeds of sale in its own treasury. Seals killed by the natives were Government seals.

Concerning alleged exclusive rights of fishing, this Court, in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, held that the White Act of June 6, 1924, 43 Stat. 464, under which the Secretary of the Interior regulated commercial fishing in Alaska, prohibited the creation of an exclusive right of fishing and that the enforcement provisions of that Act could not be used to implement the Executive Order issued under another statute which created the Karluk Reservation. However, the Court did approve (fn. 53, p. 123) *Dow* v. *Ickes*, 123 F. 2d 909, which sustained the permission given by the Secretary for trap fishing at certain locations.

In summary, at the time of passage of the Alaska Statehood Act, the general policy of Congress had not been to create exclusive rights of fishing in Alaska but had been to permit trap fishing by particular fishermen, including Indians. Permanent rights for Indians, either in lands or in fishing rights, had never been created by treaty, agreement, recognition of "original Indian title," or otherwise. Two temporary reservations, especially of waters adjoining the lands for fishing purposes, had been created for the Metlakatla (appellants in No. 326) and one other group. And Congress had protected the natives' actual possession pending further action.

One further factor requires mention. Under a Special Jurisdictional Act of June 19, 1935, 49 Stat. 388, the Tlingit and Haida Indians of Alaska filed suit in the Court of Claims to recover for the alleged taking of Indian title to "southeastern Alaska lying east of the one hundred and forty-first meridian." The Court of Claims (in October 1959) held that they were entitled to recover for the taking, or for the failure of the United States to prevent others from taking, rights of these Indians to some 20,000,000 acres of land and adjacent waters in Alaska. *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452. The first action of the United States said by the Court of Claims to be a taking from the Tlingit and Haida Indians was the establishment of the Metlakatla Reservation here involved (*id.,* p. 467). The Court of Claims said that the "most valuable asset lost to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all

others" (*id.*, p. 468).[5] With this background, we turn to the Statehood Act.

B. *Control over Indian fishing was reserved to the United States under Section 4 of the Alaska Statehood Act:*—The full text of Section 4, before amendment, is as follows:

> SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided,* That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim

[5] We by no means agree with this decision but have considered it to be inappropriate now to seek review by this Court since the issue as to amount of liability has not been determined and that determination may well influence the question whether the case is important enough to warrant review by this Court.

> shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further,* That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.*

In our view, the correct construction of this Section is that the federal rights over and power to control Indian lands, fisheries and other interests were preserved in statu quo. There was neither relinquishment of rights and a grant to the State (as it seems to contend), nor was there a recognition or grant of rights to the Indians as against the United States. Preservation of that existing situation unchanged was not, we believe, inconsistent with equal footing or with the Submerged Lands Act. But preservation of the existing situation does mean that the Federal Government continues to have exclusive control over Indian fishing in Alaska.

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* See also the amendments to Section 4 made by the Alaska Omnibus Act, 73 Stat. 141, *infra*, p. 20, fn. 12; Appendix to Brief for Appellants in No. 327, pp. 14–15.

1. The precise terms of Section 4 (as amended in 1959), as they bear on the Alaska Indians, deserve careful analysis because those terms embody the exact powers retained by the Federal Government in this field. The statute first provides that the State disclaims all right and title to "any lands *or other property* (*including fishing rights*), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or *other property* (*including fishing rights*), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the *absolute jurisdiction and control of the United States* until disposed of under its authority * * *" (emphasis added). But the Section immediately goes on, in its first proviso, to provide explicitly that the Statehood Act shall not in any way affect, for or against the claimants, "any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto". The proviso then emphasizes its purpose to leave all pre-existing claims totally unaffected by the Statehood Act by declaring that nothing in the Act should be read to authorize, establish, recognize, or confirm the validity or invalidity of any such claim.

Our reading of Section 4, in the light of this proviso (which was added at the request of the Department of Justice), is (a) that Congress retained in the Federal Government, for the future, "absolute

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jurisdiction and control" over all Indian fishing, whether or not those "fishing rights" could be considered compensable "property" in the normal sense, but (b) that Congress did not wish to take any stand whatever with respect to claims against the United States by Alaska Indians that they had compensable property, including compensable fishing rights, of which they could not be deprived without compensation. In other words, where money was involved—*i.e.*, "claims" against the Federal Government—Congress deliberately intended to leave matters in statu quo, and made no grant or confirmation to the Indians. Where money was not involved—"absolute jurisdiction and control" over Indian fishing from the viewpoint of regulation—Congress deliberately intended to keep full control in the Federal Government (*i.e.*, under the protection of the Interior Department) over Indian "fishing rights" (rather than to vest control in the States), whether or not those "fishing rights" rose to the dignity of compensable rights or were mere privileges accorded by the Federal Government in its discretion. The "fishing rights" of which Section 4 speaks need not be true property rights—and, in our view, were not—but they are fishing privileges (or "rights" in a broader sense) subject to regulation and control by the Federal Government. By the same token, other Indian "property" or "land" (as those terms are used in Section 4) need not be land or property to which the Indians have any vested rights against the United States.

2. The State's motion to affirm or dismiss, at page 16 (see also fn. 2, p. 17), suggests that it will contend that the admission of Alaska abolished the Metlakatla

Reservation or at least that part extending 3,000 feet from land.[7] If the phrase in Section 4, "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives," is read to mean property to which the Indians have *vested rights* as against the United States, like treaty reservations or recognized Indian title, then it would follow under the State's contention that the Metlakatla and Karluk reservations had been abolished by creation of the State. But such a construction is precluded by the fact that it would simply read this provision out of the Act—since it would not apply to any property in Alaska (see *supra*, pp. 6–10)—and would mean that Congress had been performing vain acts in adding the proviso and in revising the language in the Alaska Omnibus Act of 1959, 73 Stat. 141; that amendment emphasizes the language of Section 4 that "all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States". See Brief for the Appellants in No. 326, at pp. 37–39.

3. On the other hand, the appellants in No. 327 have spoken of their fishing rights and their possessory rights as if they were vested compensable rights as against the United States (Br. Opposing Motion to Dismiss, pp. 2, 5, 7). As indicated above, we cannot agree that the Statehood Act vested, granted, or recognized any rights of that description. Rather, we think

[7] The suggestion (Motion to Affirm, p. 17, fn. 2) that the Proclamation reserving the waters was void *ab initio* plainly lacks merit in view of *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 113–114.

that the Act referred to those rights of temporary possession, until the United States should act otherwise, which were being exercised, especially by means of the fish traps of appellants, at the time of passage of the Act and admission of Alaska to the Union. We believe that Congress thereby reserved control to the Federal Government over Indian lands and fishing until other provision should be made.

Nor can we agree with the implications of the phrases, in the proposed Indian fishing regulations published by the Interior Department on April 9, 1960, 25 Fed. Reg. 3079 (see Appendix to Brief for Appellants in No. 327, pp. 34–38), referring to appellants' "fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq. [the White Act], other Federal statutes, regulations and custom; and which were secured to the Alaska Eskimos, Indians and Aleuts by section 4 of the Alaska Statehood Act", and characterizing the proposed regulations as "declaring existing fishing rights of Indians in Alaska" (25 Fed. Reg. 3079; Appendix to Brief for Appellants in No. 327, p. 35)—insofar as these terms may tend to imply that appellants' fishing "rights" are in any way vested or protected as against action by the Federal Government, or legislatively "recognized" as against the Federal Government, so as to be immune from alteration or abolition without payment of compensation. Similarly, we do not believe that Section 4 of the Statehood Act—in retaining "absolute jurisdiction and control" in the United States over Indian property, including fishing rights—made it mandatory for the Secretary of the Interior to continue to grant fish-

trap privileges to appellants.[8] Our position is that under Section 4 of the Statehood Act the Secretary has full discretionary authority, pursuant to the White Act, 44 Stat. 752, 48 U.S.C. 221, to regulate and control Indian fishing in Alaska; he is no more compelled to permit the use of fish-traps in 1960 than he was in 1959 (see *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660 (C.A.D.C.)), but he has the power to do so if he chooses. The Secretary has full authority to do what he considers proper for the protection of Indian fishing rights,[9] including enlargement of fishing rights beyond those now enjoyed, subject to his consideration of other pertinent factors, including conservation.

And if the Secretary does elect to permit the use of fish-traps by appellants, in 1960 or future years, he will not be acting contrary to the White Act's proviso against the grant of an exclusive right of fishery to Indians (see *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 116–123).[10] By virtue of Sections 4 and 6 of the

[8] A press release issued by the Interior Department on April 7, 1960, in connection with the publication of the proposed regulations, seems to assume that the Secretary is *required* to permit these fish-traps, that he has no discretion to decide against their use in 1960 or thereafter, and that only Congress can decide to do away with the use of fish-traps by appellants. See Appendix to Brief for Appellants in No. 327, pp. 32–34. As indicated in the text, *supra*, we do not agree with these assumptions and have so informed the Department of the Interior. We may add that, in our view, the Department of Justice has never advised the Interior Department that the Secretary has no alternative but to permit the appellants to operate their traps if they choose to do so, or that only Congress can abolish the use of fish traps by appellants.

[9] The views of the Department of the Interior on the rights of the Indians and the duties of the Secretary are set forth in Appendix B, *infra*, pp. 35–39.

[10] This proviso reads as follows:

Provided, That every such regulation made by the Secre-

Alaska Statehood Act, the White Act can apply, from 1960 onward, only to Indian fishing in Alaska—control over non-Indian fishing now being lodged wholly in the State—and the Secretary's decision to allow Indians to use fish-traps would not discriminate against any person now subject to the White Act. The separate treatment accorded appellants (as compared to non-Indian fishermen) stems, not from any grant to appellants of an exclusive or special right under the White Act, but simply because that Act now applies only to Indian fishing. There is no discrimination or special treatment under the White Act as it now exists.

4. Our construction of Section 4 accords with the intent of Congress, both as expressed in the proviso of Section 4 (which was specially added) and as shown by the legislative history of that Section. In Hearings before the Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess., the subject of native rights was considered from many aspects (*e.g.*, pp. 122, 135, 137). The nature of pending cases, including the Court of Claims *Tlingit* case mentioned above (pp. 10–11), was explained (pp. 206 *et seq.*). The then pending *Tee-Hit-Ton* case (*supra*, pp. 6–8) was discussed (p. 210), as were the *Hynes* case and the Ninth Circuit *Miller* case (pp. 211–216), *supra*, pp. 6–7. See also *id.*, pp. 231–235, 260–268, 284, 293, 339.

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tary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. * * *

The House Committee in the 84th Cong. (H. Rept. No. 88, 84th Cong., 1st Sess.) said (p. 47): "It is provided that no attempt will be made to deal with the legal merits of the indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination." The House Committee in the 85th Cong., 1st Sess. (H. Rept. No. 624, p. 19) repeated this statement of the purpose of Section 4 and the proviso. The Senate Committee expressed the same thought in more detail, saying (S. Rept. No. 1163, 85th Cong., 1st Sess., p. 15):

> * * * The bill in its present form does not and is not intended to change or affect the laws of the United States relating to jurisdiction over Indian or native lands.
>
> The first proviso of section 4 directs that nothing contained in the act shall be construed to affect the existence or validity of any claim against the United States nor be construed as an interpretation of the meaning or application of any Federal law pertaining to such claims. The purpose of the proviso is to leave the legal question as to the existence or validity of any claim against the United States, including native claims, in exact status quo, and to leave the question for subsequent legislation or judicial decision without expressing any opinion or mandate in this act.
>
> The second proviso includes within the compact a stipulation that the State shall not impose taxes on property of the United States or native property except to the extent authorized or to be authorized by Congress, but the restriction on taxation does not apply to property held by individual natives in fee without

restrictions on alienation. This proviso expresses existing law as it applies within the States and is not intended to effect any change in such law.

Congress did add the phrase "(including fishing rights)," over the objections of the Department of Justice (which feared that the phrase might raise an implication that these Indian fishing "rights" were compensable rights),[11] but, as we have suggested, this added phrase can properly be read, together with the proviso to Section 4, as making sure that the Federal Government would retain control over Indian fishing (and not as endowing these "fishing rights" with the character of compensable property). For it is indisputable (from the legislative history summarized above) that Congress was fully informed as to the differences of view as to native rights in Alaska and expressed, in every possible way, its intent to preserve the status quo.[12] No reason appears why the Act should not be interpreted to give effect to that intent.

C. *The reservation of federal control over Indian fishing, regardless of property rights, is not incon-*

[11] See H. Rept. No. 624, 85th Cong., 1st Sess., p. 31; S. Rept. No. 1163, 85th Cong., 1st Sess., at p. 47.

[12] The amendment of Section 4 by the Alaska Omnibus Act was made to make sure that the provision "all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States" would not be interpreted to apply to lands of the United States in Alaska other than those used by natives. The importance of this limitation is emphasized by the fact that, as of June 30, 1959, the United States owned 99.1 per cent of the land in Alaska. See Inventory Reports of Real Property Owned by the United States Throughout the World (General Services Administration, 1959).

sistent with "equal footing" or with the Submerged Lands Act:—

1. The basic case of *Coyle* v. *Oklahoma,* 221 U.S. 559, recognized that "equal footing" does not prevent reservation of federal power as to matters which are within the constitutional powers of the Federal Government; the Court made reference (pp. 570, 574) to the power to regulate commerce among the States and with the Indian tribes and also public lands. Since the authority over Indians arises from the commerce clause and the treaty and war-making power, as well as from the control of disposition of federal property,[13] its exercise is not and cannot be limited simply to reserving lands for Indians. Because of the history of federal-Indian relations, and because of the geographic situation in continental United States, that control was exercised, first, in terms of reserving areas for use by the Indians to the complete exclusion of whites and of state law, and, later, to modified amalgamation with the white population by the allotment process and permissive application of state law to a limited degree, subject always to federal controls for the protection of the Indians. See *Board of Comm'rs* v. *Seber,* 318 U.S. 705, 716, where this Court summarized the history and stated that, "[T]he plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." Cf. *Williams* v. *Lee,* 358 U.S. 217. The power

[13] As to the various sources of the "federal power to regulate and protect the Indians and their property against interference even by a state", see *Board of Comm'rs* v. *Seber,* 318 U.S. 705, 715.

has not hinged on any considerations of principles of property law or of the existence of rights, legal, equitable or moral, in particular lands. Thus, while the Indians have no such right as against the United States in lands temporarily set aside for their use, such as reservations created by Executive Order, *Sioux Tribe* v. *United States*, 316 U.S. 317, this Court has never held that this circumstance diminishes the federal power to regulate such Indians or permits application of conflicting state law. Cf. *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99.

When dealing with Indians in the northwestern United States where fishing, especially in tidal waters, was of great concern and required protection to promote the welfare of the Indians, the courts have recognized that such compelling circumstances may produce an exception to results that might otherwise follow from admission of a state to the Union. Although it is often said that tidelands in territories are held in trust for future states and that title thereto vests in the state upon admission, that is not the result when a reservation has been created for Indians. *Moore* v. *United States*, 157 F. 2d 760 (C.A. 9), so held in concluding that the State of Washington's fishing regulations did not extend to tidelands of the Quillayute Indian Reservation.[14] In *Alaska Pacific Fisher-*

[14] See, also, *Shively* v. *Bowlby*, 152 U.S. 1, 48, 57–58; *Taylor* v. *United States*, 44 F. 2d 531, 533 (C.A. 9); *Montana Power Co.* v. *Rochester*, 127 F. 2d 189, 191 (C.A. 9); *United States* v. *Romaine*, 255 Fed. 253, 259 (C. A. 9).

ies v. *United States,* 248 U.S. 78, this Court said (pp. 87–88):

> That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank* v. *County of Yankton,* 101 U.S. 129, 133; *Shively* v. *Bowlby,* 152 U.S. 1, 47–48, 58; *United States* v. *Winans,* 198 U.S. 371, 383. The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States. See *United States* v. *Kagama,* 118 U.S. 375, 379, *et seq.; United States* v. *Rickert,* 188 U.S. 432, 437.

It is clear that exclusive rights to the fishing sites here concerned could have been specifically reserved by Congress through creation of a temporary Indian reservation, regardless of whether permanent beneficial rights might be later vested in the Indians. It follows, we believe, that the lesser reservation of power to control and regulate Indian fishery may constitutionally be reserved, and that this is what was done with respect to Alaska.[15]

[15] The specific reservation in Section 4 of the Statehood Act is the reason *Ward* v. *Race Horse,* 163 U.S. 504, is irrelevant here.

2. What we have said disposes of any contention based on the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1311–1315, which specifically excepts "lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band or group of Indians or for individual Indians" (43 U.S.C. 1313(b)). The Submerged Lands Act is specifically referred to in Section 6(m) of the Statehood Act, which says that Alaska "shall have the same rights as do existing States thereunder." Certainly, Congress saw no conflict between that Act and the reservation of control over Indian fisheries in Section 4 of the Statehood Act.

CONCLUSION

For the foregoing reasons it is submitted that the judgments below should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
Attorney.

MAY 1960.

APPENDIX A

ALASKA STATEHOOD ACT (72 STAT. 339)

Section 1.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8(c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "And Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date", approved March 19, 1955 (Chapter 46, Session Laws of Alaska, 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

* * * * * *

Section 6(e).

* * * *Provided,* That the administration and management of the fish and wildlife resources of Alaska

shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: * * *.

* * * * *

Section 8(d).

Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

* * * * *

Section 12.

Effective upon the admission of Alaska into the Union—

(a) The analysis of chapter 5 of title 28, United States Code, immediately preceding section 81 of such title, is amended by inserting immediately after and underneath item 81 of such analysis, a new item to be designated as item 81A and to read as follows: "81A. Alaska";

(b) Title 28, United States Code, is amended by inserting immediately after section 81 thereof a new section, to be designated as section 81A, and to read as follows:

"§ 81A. Alaska

"Alaska constitutes one judicial district.

"Court shall be held at Anchorage, Fairbanks, Juneau, and Nome.";

(c) Section 133 of title 28, United States Code, is amended by inserting in the table of districts and judges in such section immediately above the item: "Arizona * * * 2", a new item as follows: "Alaska * * * 1";

(d) The first paragraph of section 373 of title 28, United States Code, as heretofore amended, is further amended by striking out the words: "the District Court for the Territory of Alaska,": *Provided,* That the amendment made by this subsection shall not affect the rights of any judge who may have retired before it takes effect;

(e) The words "the District Court for the Territory of Alaska," are stricken out wherever they appear in sections 333, 460, 610, 753, 1252, 1291, 1292, and 1346 of title 28, United States Code;

(f) The first paragraph of section 1252 of title 28, United States Code, is further amended by striking

out the word "Alaska," from the clause relating to courts of record;

(g) Subsection (2) of section 1294 of title 28, United States Code, is repealed and the later subsections of such section are renumbered accordingly;

(h) Subsection (a) of section 2410 of title 28, United States Code is amended by striking out the words: "including the District Court for the Territory of Alaska,";

(i) Section 3241 of title 18, United States Code, is amended by striking out the words: "District Court for the Territory of Alaska the";

(j) Subsection (e) of section 3401 of title 18, United States Code, is amended by striking out the words: "for Alaska or";

(k) Section 3771 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "the Territory of Alaska,";

(l) Section 3772 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "the Territory of Alaska,";

(m) Section 2072 of title 28, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "and of the District Court for the Territory of Alaska";

(n) Subsection (q) of section 376 of title 28, United States Code, is amended by striking out the words: "the District Court for the Territory of Alaska", *Provided,* That the amendment made by this subsection shall not affect the rights under such section 376 of any present or former judge of the District Court for the Territory of Alaska or his survivors;

(o) The last paragraph of section 1963 of title 28, United States Code, is repealed;

(p) Section 2201 of title 28, United States Code, is amended by striking out the words: "and the District Court for the Territory of Alaska"; and

(q) Section 4 of the Act of July 28, 1950 (64 Stat. 380; 5 U.S.C., sec. 341b) is amended by striking out the word: "Alaska,".

Section 13.

No writ, action, indictment, cause, or proceeding pending in the District Court for the Territory of Alaska on the date when said Territory shall become a State, and no case pending in an appellate court upon appeal from the District Court for the Territory of Alaska at the time said Territory shall become a State, shall abate by the admission of the State of Alaska into the Union, but the same shall be transferred and proceeded with as hereinafter provided.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Alaska in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said courts had been established prior to the accrual of said causes of action or the commission of such offenses; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Alaska.

Section 14.

All appeals taken from the District Court for the Territory of Alaska to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit, previous to the admission of Alaska as a State, shall be prosecuted to final determination as though this Act had not been passed. All cases in which final judgment has been rendered in such district court, and in which appeals might be had except for the admission of such State, may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit under the provisions of then existing law, and there held and determined in like manner; and in either case, the Supreme Court of the United States, or the United States Court of Appeals, in the event of reversal, shall remand the said cause to either the State supreme court or other final appellate court of said State, or the United States district court for said district, as the case may require: *Provided,* That the time allowed by existing law for appeals from the district court for said Territory shall not be enlarged thereby.

Section 15.

All causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State which are of such nature as to be within the jurisdiction of a district court of the United States shall be transferred to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts. All other causes pending or

determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State shall be transferred to the appropriate State court of Alaska. All final judgments and decrees rendered upon such transferred cases in the United States District Court for the District of Alaska may be reviewed by the Supreme Court of the United States or by the United States Court of Appeals for the Ninth Circuit in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts.

Section 16.

Jurisdiction of all cases pending or determined in the District Court for the Territory of Alaska not transferred to the United States District Court for the District of Alaska shall devolve upon and be exercised by the courts of original jurisdiction created by said State, which shall be deemed to be the successor of the District Court for the Territory of Alaska with respect to cases not so transferred and, as such, shall take and retain custody of all records, dockets, journals, and files of such court pertaining to such cases. The files and papers in all cases so transferred to the United States district court, together with a transcript of all book entries to complete the record in such particular cases so transferred, shall be in like manner transferred to said district court.

Section 17.

All cases pending in the District Court for the Territory of Alaska at the time said Territory becomes a State not transferred to the United States District Court for the District of Alaska shall be proceeded with and determined by the courts created by said State with the right to prosecute appeals to the appel-

late courts created by said State, and also with the same right to prosecute appeals or writs of certiorari from the final determination in said causes made by the court of last resort created by such State to the Supreme Court of the United States, as now provided by law for appeals and writs of certiorari from the court of last resort of a State to the Supreme Court of the United States.

Section 18.

The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section.

CONSTITUTION OF ALASKA

(See H. Rept. No. 624, 85th Cong., 1st Sess., pp. 49–79)

* * * * *

Article XV, Section 1.

All laws in force in the Territory of Alaska on the effective date of this constitution and consistent therewith shall continue in force until they expire by their own limitation, are amended, or repealed.

* * * * *

Article XV, Section 4.

All officers of the Territory, or under its laws, on the effective date of this constitution shall continue to perform the duties of their offices in a manner consistent with this constitution until they are superseded by officers of the State.

* * * * *

Article XV, Section 17.

Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law.

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48 U.S.C. 101

There is established a district court for the District of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; and four district judges shall be appointed for the district, each

at an annual salary of $15,000, who shall during their terms of office reside in the divisions of the district to which they may be respectively assigned by the President. The court shall consist of four divisions, which shall also be recording divisions.

* * * * *

APPENDIX B

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., May 4, 1960.

By messenger

90-2-0-544

Hon. J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. RANKIN: We have reviewed the draft of brief which you propose to file *amicus curiae* in the Supreme Court in *Metlakatla Indian Community, Annette Island Reserve* v. *Egan, Governor of Alaska, et al.*, No. 326, and in *Organized Village of Kake, et al.* v. *Egan, Governor of Alaska*, No. 327.

We are pleased to see that your study of these cases has led you to conclude that the court has jurisdiction and that the cases have not become moot. We are also pleased to note your position that the purpose of section 4 of the Alaska Statehood Act was to maintain the status quo until the Congress should provide otherwise. That is the position which this Department has consistently taken and which has been communicated to you in our prior correspondence and discussions.

In response to your invitation, we should like to restate and expand the expression of the views and position of the Department of the Interior on two points which are touched upon by the proposed brief and which have been the subject of several discussions

between representatives of our two departments. These being matters of predominant importance to the natives of Alaska they are, by that token, of the greatest concern to the Secretary of the Interior in his traditional role as the officer of the executive branch of the Government charged by law with the administration of Indian affairs and the execution of the national policy respecting the Indians.

The two points to which we refer are somewhat interrelated. They have to do with (1) whether the purpose and effect of section 4 of the Alaska Statehood Act, as amended, was to define and classify Indian fishing rights as vested, compensable property, and (2) the scope of the Secretary's regulatory power over the Indian fishing activity.

Section 4 of the amended Statehood Act preserves in status quo full Federal control over Indian lands and other property, including fishing rights. It does this in terms that withhold these matters from the reach of State authority, reciting specifically that they shall "be and remain under the absolute jurisdiction and control of the United States." Quite clearly, from the language of section 4 in its entirety as well as its legislative history, Congress manifested its intent to maintain the status quo, taking this action with knowledge of the prior rulings of the Supreme Court which recognized that the ultimate power to resolve the problem of native rights in Alaska rested with the Congress. See *Hynes* v. *Grimes,* 337 U.S. 86 (1949); *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955). This means to us that the Congress maintained in status quo the position of the United States as it existed immediately before statehood, namely, the continuation of full Federal control over the Indian fishing activity and the retention of full Federal power to define, classify,

resolve and determine the nature and extent of Indian fishing rights. Also, the Congressional purpose to maintain the status quo must mean to us that the Indians' rights, whatever their nature, were preserved under full Federal authority for ultimate determination by the Congress or the courts. The act made clear the lack of State authority but made nothing compensable as against the United States which was not compensable before statehood. We feel these conclusions must surely inhere in the conception that the Statehood Act was designed to maintain the status quo.

Any exercise by the Secretary of the Interior of regulatory power over the Indian fishing activities obviously must be by way of implementation of the Statehood Act and cannot be contrary to the Congressional objective of maintaining the status quo. So considered, the Secretary of the Interior in regulating the Indian fishing activity was required to continue the Indians' fish-trap operations as he found them to be immediately before statehood. The statute speaks in terms of the *natives'* fishing rights which, as we have demonstrated, are to be maintained in status quo until the Congress or the courts may clarify or resolve the matter. It follows logically that the natives' fishing rights could not be maintained in status quo by the Secretary of the Interior regulating their fishing activity in a way that would limit it to something less than that visible to the Congress when section 4 of the Statehood Act was enacted. Moreover, the Statehood Act, speaking in terms of native fishing rights cannot be equated into a grant of power to the Secretary to limit or eliminate Indian fishing. We must reject categorically the idea that section 4 of the Statehood Act, designed to maintain the status quo, also clothed the Secretary of the Interior with unlimited discretionary authority to limit

or shrink the Indian fishing activity that existed on the instant before statehood. It has been recognized by the courts that the power to regulate cannot be exercised in a way that abridges or destroys the Indian rights which are the subject of the regulation. See *Mason* v. *Sams*, 5 F. (2d) 255 (1925); *Tulee* v. *Washington*, 315 U.S. 681 (1942). And no remnants of regulatory power under the White Act (48 U.S.C. 221) could have survived the Statehood Act so as to clothe the Secretary with discretionary authority to limit or destroy the Indian fishing activity which Congress had held in status quo. The view that the Secretary of the Interior is clothed with full discretionary authority under the White Act to shrink the Indian fishing activity after the enactment of the Statehood Act undermines and makes ineffective the entire concept of Congress having maintained the status quo until it could resolve the problem of native rights as a matter of legislative prerogative. Indeed, the argument in favor of full discretionary authority in the Secretary to regulate Indian fishing after Alaska statehood must lead to the illogical conclusion that the Secretary of the Interior, being without Congressional direction or limitation, could not only limit the Indian fishing activity but could enlarge it as well. Here, again, the fallacy of the view that the Secretary has full discretionary authority is demonstrated merely by reference to the Congressional intention to preserve the status quo.

Historically, the purpose of retained federal controls in Indian matters has always been the protection of the Indians, and the Secretary of the Interior, in the exercise of regulatory authority over the subject denominated by the Congress as Indian "fishing rights" could not lose sight of the historical obliga-

tion to protect the Indians' rights, and to do so within the law.

To summarize:

1. The purpose and effect of section 4 of the Alaska Statehood Act was to maintain the status quo, leaving undisturbed after statehood the noncompensable character of those Indian fishing activities which were noncompensable before statehood.

2. The Secretary of the Interior, in exercising regulatory authority over the Indian fishing activity, must do so by way of implementation of the Statehood Act and cannot, by regulation, limit or terminate the fish-trap operations in which the Indians were engaged immediately before statehood.

Sincerely yours,

GEORGE W. ABBOTT, *Solicitor.*

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